FEB 24 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1177

WELLCO COMPANY,

Petitioner,

vs.

WILLIE FRANKLIN,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois denying the Petition for reconsideration entered on January 18, 1973; and since the Supreme Court of Illinois previously denied the Petition for Leave to Appeal on September 28, 1972, Petitioner further prays that this Court review the judgment and opinion of the Appellate Court of Illinois, First Judicial District, entered on May 4, 1972.

OPINIONS BELOW.

The opinions of the Supreme Court of Illinois have not been reported as yet. The opinion of the Appellate Court of Illinois is reported in 5 Ill. App. 3d 731.

JURISDICTION.

The date of the opinion of the Supreme Court of Illinois is January 18, 1973. This Petition is filed within 90 days from said date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

1.) Does the Circuit Court of Cook County have jurisdiction to hear a petition to vacate a judgment pursuant to Section 72 of the Illinois Civil Practice, where the judgment sought to be vacated was based on an award of the Illinois Industrial Commission.

2.) Does the refusal of the Circuit Court of Cook County to hear Defendant's petition to vacate a judgment pursuant to § 72 of the Illinois Civil Practice violate the Defendant's right to due process of law under the 14th Amendment of the United States Constitution where it appears from the record that the underlying judgment, and the award of the Illinois Industrial Commission upon which said judgment was based, were entered by default and without receipt of notice by said defendant.

STATUTORY PROVISIONS INVOLVED.

Section 72(1) of the Illinois Civil Practice Act, (Ill. Rev. Stat. (1969) Chapt. 110); Section 138.19 (f) (f-1); 138.19(g) of the Illinois Workmen's Compensation Act, (Ill. Rev. Stat. (1969) Chapter 48).

Section 1 of the 14th Amendment to the Constitution of the United States.

(The pertinent provisions of these acts appear in the appendix).

STATEMENT OF CASE.

On October 28, 1968, three awards were entered in favor of Willie Franklin, Respondent, and against the Wellco Company, Petitioner, in the amount of $1,959.00, $1,800.00, and $2,820.00 respectively by an Arbitrator of the Industrial Commission of Illinois. These awards were based upon alleged accidental injuries sustained by respondent arising out of and in the course of his employment with petitioner's company, and that said awards later became final awards of the Commission.

On April 7, 1969 the Industrial Commission ordered as a penalty 50 per cent of the above amounts to be added to the original awards for alleged vexatious delay in their payment.

Thereafter, Willie Franklin filed a petition for judgment with the Circuit Court of Cook County and requested in said petition additional attorney's fees in the amount of $3,289.50 pursuant to Ill. Rev. Stat., Ch. 48 § 138.19(g).

On July 15, 1969, a judgment was entered in favor of Willie Franklin, respondent, substantially as requested in his petition and attorney's fees of $3,289.50 were added by the judge and execution was ordered to issue. Said judgment was entered without any prior notice being given to the petitioner, Wellco Company.

On October 28, 1969, the petitioner filed in the Circuit Court of Cook County a petition to vacate the judgment

entered on July 15, 1972, pursuant to Section 72 of the Illinois Civil Practice Act.

This petition was Verified by Glenn Wellman, President of Wellco Chemical Company, and alleged as follows:

1.) That it had no knowledge that the judgment had been entered until October 1, 1969, when a garnishment was served upon the corporate bank account, and that it brought this petition with due diligence.

2.) That it had a meritorious defense to said claim as follows: That the respondent was an employee of the Defendant and was discharged for cause. That while an employee he had incurred one or possibly two minor injuries requiring a total hospitalization of only one day. That respondent had entered into a written agreement on November 4, 1967 with petitioner to refrain from filing a Workmen's Compensation claim if Petitioner would pay his medical expenses and eight weeks salary.

That shortly after his discharge for cause, respondent filed three claims against the petitioner even though petitioner fully complied with the terms of the aforementioned agreement.

3.) That at the time Willie Franklin was injured in November 1967, the Wellco Company was located at 2535 Armitage Avenue, Chicago, Illinois, and it then moved to 1960 N. Wilmont, Chicago, Illinois where on June 21, 1968, a disastrous fire occurred and destroyed the entire Wellco plant, its administrative offices and a great portion of its records. The Defendant failed to receive notice of the hearing of October 28, 1968 and the notice of application for

judgment resulting in the judgment of July 15, 1969. Attached to the petition were copies of the notices of the Industrial Commission showing notices mailed to Defendant at 2535 W. Armitage, Chicago, Illinois. Since Defendant was not at this address he failed to receive timely notices.

Willie Franklin filed a Motion to Strike Defendant's Petition on the ground that the Court had no jurisdiction to grant the relief sought by the petition (to vacate the judgment). On January 14, 1970, the Circuit Court of Cook County denied the petition and granted judgment in favor of Willie Franklin, which included the requested attorney's fees in the amount of $3,289.50.

On appeal, the Appellate Court of Illinois, First Judicial District held that Section 19(f) of the Workmen's Compensation Act was controlling and the exclusive means of appealing an award of the Commission was by Writ of Certiorari and not by answer or petition under § 72 of the Civil Practice Act. The Court stated further that since the record failed to show a refusal to pay the award by the Wellco Company, the portion of the judgment granting Attorney fees be reversed and remanded to the lower court for rehearing.

On June 6, 1972, the Appellate Court Denied Wellco Company's petition for rehearing.

On September 28, 1972, the Supreme Court of Illinois denied Wellco's Petition for Leave to Appeal. Later, on January 18, 1973, the same court denied Wellco Company's petition for Reconsideration of its prior order denying leave to appeal.

REASONS FOR GRANTING THE WRIT.

The decisions of the Supreme Court of Illinois and the nderlying decision of the Appellate Court of Illinois, 'irst Judicial District, have created precedent relating o the enforcement of Workmen's Compensation awards hich under the present factual situation, and others sim- ar thereto, would deprive a substantial class of em- loyers of their property without due process of law.

The Illinois Appellate Court pointed out in its decision at the exclusive means of appealing an award of the linois Industrial Commission is by petition for Writ Certiorari to the Circuit Court of the County pur- ant to § 19(f) of the Workmen's Compensation Act. ll. Rev. Stat., 1969, Ch. 48 Par. 138.19 (f)). This section so provides that such suit by Writ of Certiorari shall commenced within 20 days of the *receipt of notice of e decision of the commission.*

The record indicates that Wellco Company had not eived notice of the award from the Industrial Commis- n since all notices had been sent to its former address 2535 Armitage Avenue, Chicago, Illinois. Actual notice the award did not exist until after Willie Franklin l already obtained judgment upon the award (July 15, 9) and garnishment proceedings initiated to enforce l judgment (October 1, 1969). Once Wellco Company w of the existence of the judgment it filed its petition vacate said judgment (October 28, 1969) pursuant to 2 of the Civil Practice Act (Ill. Rev. Stat. 1969, Ch. § 72).

Since the award of the Industrial Commission had already become a judgment in the Circuit Court of Cook County it would have been a useless act on the part of Wellco Company to petition for Writ of Certiorari for review of the award, when garnishment proceedings had already commenced to enforce a judgment based upon said award. Obviously, the first step required of Wellco Company was to vacate the judgment which it attempted to do by filing its petition under Section 72 of the Civil Practice Act. Furthermore, while this matter was pending in the Circuit Court of Cook County more than 20 days had already lapsed from the date Wellco Company received actual notice of the existence of the award of the Industrial Commission, and under § 19(f) of the Workmen's Compensation Act it was precluded from reviewing the award by the Writ of Certiorari procedure. Thus, the only avenue open to Wellco Company at this juncture was to appeal to the equitable jurisdiction of the court to vacate the judgment as supported by the affidavit of its president, Glenn Wellman. Although the Circuit Court of Cook County has inherent jurisdiction to review awards of Industrial Commission pursuant to § 19(f) mentioned above, the Appellate Court indicated that the Circuit Court could not do so by any means other than by Writ of Certiorari as provided in the Workmen's Compensation Act. The Appellate Court seemed to emphasize procedure over substance and obviously, failed to consider the impossibility of Wellco Company proceeding under a Writ of Certiorari due to the passage of the 20 day statutory period.

A Petition filed under § 72 invokes the equitable powers of the court as justice and fundamental fairness require

and courts and litigants must make reasonable accommodation in matters of notice to the end that no one will be inequitably deprived of a right to be heard on any matter. *Grones* v. *Sebastian*, 1968, 98 Ill. App. 2d 347, 240 N.E. 2d 192. Certainly the Circuit Court's granting of the Motion to Strike deprived Wellco Company of their right to be heard on the matter of the underlying judgment.

There is no question that the Circuit Court of Cook County has inherent jurisdiction under § 72 of the Civil Practice Act to vacate judgments previously entered by said Court. The Appellate Court, however, would have us make a distinction between judgments based upon awards of the Industrial Commission and other judgments in general. Section 72 states that "relief from final orders, judgments and decrees, after 30 days from entry thereof, may be had by petition as provided in that section". Therefore, the refusal of the trial court to hear the Wellco Company's petition under § 72 was clearly erroneous. Furthermore, under its equitable jurisdiction, and based upon the uncontroverted facts included in the affidavit of Glenn Wellman that no notice of the existence of the award or the subsequent judgment had been received prior to the garnishment proceeding of October 1969, the trial court could have vacated the judgment and by entering the appropriate orders could have given Wellco Company the appropriate time to file for review of the award pursuant to § 19(f) of the Workmen's Compensation Act. However, the Circuit Court of Cook County refused to consider the petition and granted Allie Franklin's Motion to Strike.

The unfortunate consequences of the Appellate Court's decision is that Petitioner has been denied the relief that

was made available to it under § 72 of the Civil Practice Act. By virtue of the destruction of its place of business the petitioner was forced to change his business address resulting in the non-receipt of notice of the legal developments in this case. Thus, a default award of the Industrial Commission and a subsequent default judgment in the Circuit Court of Cook County are allowed to stand without the petitioner having its day in Court. Execution of said judgment will deprive the petitioner of his property without due process of law as guaranteed by the 14th Amendment of the United States Constitution.

CONCLUSION.

Wherefore, Wellco Company, Petitioner, prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Illinois and the judgment and opinion of the Appellate Court of Illinois, First Judicial District in the above entitled case.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. Justice Dempsey Delivered The Opinion Of The Court:

Willie Franklin, an employee of the Wellco Company, was injured three times during the course of his employment. He filed applications with the Industrial Commission of Illinois seeking compensation for his injuries. An arbitrator granted him awards totaling $6,579. Wellco did not file a petition to review the awards and they became final.

The compensation was not paid and the commission, as permitted by statute (Ill. Rev. Stat., 1967, ch. 48, para. 138.19(k)) increased the amount of the awards by 50 per cent ($3,289.50). Wellco did not appeal.

Payment of $9,868.50 was not forthcoming and Franklin turned to the Circuit Court pursuant to section 19(g) of the Workmen's Compensation Act (ch. 48, para. 138.19(g)) and obtained a judgment for that amount. The court fixed Franklin's attorney fees at $3,289.50 and the total judgment thus became twice the sum of the original awards.

After Wellco's bank account was garnisheed, it filed a petition under section 72 of the Civil Practice Act (Ill. Rev. Stat., 1969, ch. 110, para. 72) to vacate the judgment. Wellco alleged that its petition was filed promptly after learning of the judgment, that it had not received

timely notice of the proceedings before the Industri Commission or the court, and that it had meritoriou defenses to Franklin's claims for compensation.

Franklin moved to strike the petition on the groun that the court was without jurisdiction to review th awards. The motion to strike was sustained and Wellc appealed to this court. It contends that the trial cou had jurisdiction to consider the petition on its merit and that it also had jurisdiction because it had allowe costs and attorney fees.

As noted, Wellco did not appeal the arbitrator's dec sion or the penalty of the commission imposed. The juris diction which the Circuit Court exercises in workmen' compensation cases is a special statutory jurisdiction an a party desiring judicial review must comply with all th conditions prescribed. *Moweaqua Coal Co.* v. *Industri Commission,* 322 Ill. 403, 153 N.E. 678 (1926). Sectio 19(f) of the Workmen's Compensation Act (Ill. Rev Stat., 1969, ch. 48, para. 138.19(f)) affords the exclusiv means of appealing an award of the commission. An em ployer cannot have the award reviewed by filing a answer in an action brought by the employee under sec tion 19(g) to enforce the award (*McCormick* v. *McDougal Hartmann Co.,* 47 Ill. 2d 340; *Gerish* v. *Feldman,* 381 Ill 635) or by means of a petition under section 72 of th Civil Practice Act. A section 72 petition cannot cure th jurisdictional defect caused by not proceeding with a appeal in accordance with section 19(f). *Sears Roebuc and Co.* v. *Industrial Commission,* Ill. App. 2d 273 N.E. 2d 725 (1971).

(Appellate Court Opinion)

The purpose of section 19(g) is to permit speedy judgment in cases where there has been a refusal to pay the award and a need to reduce the award to judgment to compel its payment. The statute delineates the powers of the court in such a situation. It declares that when a final award of the commission is presented to the court, "said court shall render a judgment in accordance therewith. . . ." The court lacks the power to pass upon the merits of the claims upon which the award was based or to hear arguments in opposition to those claims. In the present case, the court would have exceeded its authority if it had entertained that part of Wellco's petition which sought to contest the awards. Insofar as Wellco's petition was addressed to the propriety and amount of the awards, the court properly denied the petition to vacate the judgment.

A further purpose of section 19(g) is to compensate a claimant who is compelled to incur additional expense by reason of the refusal to pay an award by allowing him court costs and attorney fees. *McMurray* v. *Peabody Coal Co.*, 281 Ill. 218, 118 N.E. 29 (1917). The statute empowers the court to tax "the reasonable costs and attorney fees in the arbitration proceedings and in the court entering the judgment." In entering the judgment in the instant case, the court taxed the costs of the proceedings against Wellco and allowed Franklin attorney fees. Inasmuch as the amount of these awards had been determined by the court itself, it had jurisdiction over this part of its judgment.

A petition drawn under section 72 of the Practice Act was a proper vehicle to reach this judgment. Wellco's

petition, however, made only an oblique reference to attorney fees; it merely stated "That it would be inequitable to allow an award of $13,000 to stand for relatively minor injuries. . . ." Ordinarily, the failure to bring the subject specifically to the attention of the trial court would preclude its consideration in this court. *Lehman* v. *Arnold,* 76 Ill. App. 2d 124, 221 N.E. 2d 331 (1966). A section 72 petition is to be considered in the light of equitable principles. *Elfman* v. *Evanston Bus Co.,* 27 Ill. 2d 609, 190 N.E. 2d 348 (1963). *Larsh* v. *Green Gold Farms, Inc.,* 68 Ill. App. 2d 113, 214 N.E. 2d 924 (1966). Wellco's petition must be considered as a whole and it must be evaluated in connection with the statute which permits the granting of attorney fees where an Industrial Commission award remains unpaid. A major allegation in the petition was that Wellco was unaware of the proceedings before the commission and knew nothing of the awards until its bank account was garnisheed. The petition alleged that Wellco moved its plant and administrative offices shortly after Franklin was injured; six months later, its new plant and offices were destroyed by fire and 90 per cent of its administrative files and records were either destroyed or damaged beyond recognition; after the fire it had temporary office space for one month; subsequently, it leased space at another location on a month-to-month basis, and finally, it moved to a permanent address. It thus had five different addresses from the time of Franklin's injuries to the date of the judgment. The petition alleged that notices of the commission proceedings and the application for judgment were never received. Franklin's motion to strike admitted the truth of all Wellco's allegations. The statute states that rea-

sonable attorney fees shall be taxed when the employer *refuses* to pay the awards. Accepting the accuracy of Wellco's averments, it follows that it could not have refused to pay something it knew nothing about. Under these circumstances, it would have been advisable for the court to have considered the broad base and equitable aspects of the petition and to have taken jurisdiction of that portion of it which was addressed to the propriety and size of the fee allowed Franklin's counsel.

The motion to strike should be denied and, after appropriate pleadings have been filed, a hearing should be held to determine if Wellco knew of the awards and refused to pay them; to determine if attorney fees are proper and, if so, to receive proof as to the reasonable amount of those fees. The judgment will be affirmed insofar as it pertained to the Industrial Commission's awards. The judgment awarding attorney fees will be reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and cause remanded.

McGLOON, PJ., and MCNAMARA, J., concur.

APPENDIX B

Order of the Supreme Court of Illinois Denying Motion for Reconsideration of Order Denying Leave to Appeal

January 18, 1973

And now, on this day, the Court having duly consid ered the motion by petitioner for reconsideration of th order denying petition for leave to appeal, and being no fully advised of and concerning the premises;

It Is Hereby Ordered that the motion by petitioner fo reconsideration of the order denying petition for leav to appeal be, and the same is, denied.

APPENDIX C

Statutory Provisions Involved

(Civil Practice Act)

Ill. Rev. Stat., 1969, Chapter 110, Section 72(1)

Relief from final orders; judgments and decrees, after 30 days from entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, Writs of audita querela, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to the availability of relief, grounds for relief or the relief obtainable.

(Illinois Workmen's Compensation Act)

Ill. Rev. Stat., 1969, Chapter 48, Section 138.19(f)

The decision of the Commission acting within its powers, according to the provisions of paragraph (e) of this Section shall in the absence of fraud, be conclusive unless reviewed as in this case as in this paragraph here-

(Statutory Provisions Involved)

inafter provided. However, the Arbitrator or the Commission may on his or its own motion, or on the motion of either party, correcting clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision. . . .

Judicial Review—Certiorari

Section (f)(1)

Except in cases of claims against the State of Illinois, in which case the decision of the Commission shall not be subject to judicial review, the Circuit Court of the County where any of the parties defendant may be found, or if none of the parties defendant can be found in this State then the Circuit court of the County where the accident occurred, shall by Writ of Certiorari to the Commission have power to review all questions of law and fact presented by such record.

Such suit by Writ of Certiorari shall be commenced within 20 days of the receipt of notice of the decision of the Commssion. . . .

Ill. Rev. Stat., 1969, Chapter 48, Section 138.19(g)

Judgment on Award—Refusal to pay Compensation Costs of Attorney's fees, Modification of Judgment, Notice of entry of Judgment.

(Statutory Provisions Involved)

Except in the case of a claim against the State of Illinois, either party may present a certified copy of the award of the Arbitrator, or a certified copy of the decision of the Commission when the same has become final, when no proceedings for review are pending, providing for the payment of compensation according to this Act, to the Circuit Court of the county in which such accident occurred, or either of the parties are resident. Whereupon said court shall render a judgment in accordance therewith. In case where the employer refuses to pay compensation according to such final award or such final decision upon which such judgment is entered the court shall in entering judgment thereon, tax as costs against him the reasonable costs and attorney fees in the arbitration proceedings and in the court entering the judgment for the person in whose favor the judgment is entered, which judgment and costs taxed as therein provided shall, until and unless set aside, have the same effect as though duly rendered in an action duly tried and determined by said court, and shall with like effect, be entered and docketed. The Circuit Court shall have power at any time upon application to make any such judgment conform to any modification required by any subsequent decision of the Supreme Court upon appeal, or as the result of any subsequent proceedings for review, as provided in this Act.

Judgment shall not be entered until 15 days' notice of the time and place of the application for the entry of judgment shall be served upon the employer by filing such notice with the Commission which Commission shall, in case it has on file the address of the employer or the

name and address of its agent upon whom notices may be served, immediately send a copy of the notice to the employer or such designated agent.

14th Amendment to the Constitution of the United States, Section 1

. . . no state shall make or enforce any law which shall abridge the privileges and or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .